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**REDACTED – FOR PUBLIC INSPECTION**

November 12, 2015

*By ECFS*

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

**Re: Applications of Charter Communications, Inc., Time Warner Cable Inc., and  
Advance/Newhouse Partnership for Consent to Assign or Transfer Control of  
Licenses and Authorizations, MB Docket No. 15-149**

Dear Ms. Dortch:

In accordance with the *Protective Order* in the above-captioned proceeding,<sup>1</sup> INCOMPAS hereby submits the attached public, redacted version of its Reply. INCOMPAS has denoted with “{{**BEGIN HCI** **END HCI**}}” symbols where Highly Confidential Information has been redacted. The designated Highly Confidential Information in the Reply was taken from or derived from Highly Confidential Information in the Applicants’ filings. A Highly Confidential version of this Reply is being simultaneously filed with the Commission and will be made available pursuant to the terms of the *Protective Order*.

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<sup>1</sup> Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 15-149, Protective Order, DA 15-110 (Sept. 11, 2015) (“*Protective Order*”).

Marlene H. Dortch  
November 12, 2015  
Page 2



Please contact me with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. C. Erickson", with a horizontal line extending to the right.

Markham C. Erickson  
*Counsel for INCOMPAS*

Enclosure

REDACTED – FOR PUBLIC INSPECTION

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Applications of	)	MB Docket No. 15-149
	)	
<b>Charter Communications, Inc., Time</b>	)	
<b>Warner Cable Inc., and</b>	)	
<b>Advance/Newhouse Partnership</b>	)	
	)	
For Consent To Transfer Control of	)	
Licenses and Authorizations	)	

**REPLY OF INCOMPAS**

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November 12, 2015

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<b>Advance/Newhouse Partnership</b>	)	
	)	
For Consent To Transfer Control of	)	
Licenses and Authorizations	)	

**REPLY OF INCOMPAS**

INCOMPAS<sup>1</sup> submits this Reply on the above-referenced acquisition of Time Warner Cable Inc. (“TWC”) and Bright House Networks (“BHN”) by Charter Communications, Inc. (“Charter”) (collectively, the “Applicants”).<sup>2</sup> The Applicants have not demonstrated, based on their Application<sup>3</sup>—or in their recent Opposition to Petitions to Deny<sup>4</sup>—that the merger would serve the public interest.

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<sup>1</sup> INCOMPAS, formerly known as COMPTTEL, recently announced its decision to do business as INCOMPAS on October 19, 2015. This change reflects the association’s growth and evolving membership as well as its commitment to innovation, competition, and the future. INCOMPAS has not made other changes to its corporate structure or financial interests. INCOMPAS has been participating in the above-captioned proceeding under the name “COMPTTEL” until its announcement, but it will participate as “INCOMPAS” going forward.

<sup>2</sup> See Public Notice, Commission Seeks Comment on Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 15-149, DA 15-1010 (Sept. 11, 2015).

<sup>3</sup> See Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 15-149 (June 25, 2015) (“Application”).

## I. INTRODUCTION AND SUMMARY

In its Opposition, Charter failed to answer the central concern raised by INCOMPAS's Petition to Deny, which is that the proposed merger would create a significant new barrier to future broadband competition in the merged firms' combined footprint.<sup>5</sup> The Commission must take into account the merger's likely effect on current and future competition.<sup>6</sup> The requirement for such an analysis is even more imperative given the Commission's findings regarding the inadequate state of broadband competition in the United States,<sup>7</sup> including the insufficient level of broadband competition in the Applicants' footprints.<sup>8</sup>

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<sup>4</sup> See Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership, Opposition to Petitions to Deny and Response to Comments, MB Docket No. 15-149 (Nov. 2, 2015) ("Opposition").

<sup>5</sup> INCOMPAS, Petition to Deny, MB Docket No. 15-149, at 5-13 (Oct. 13, 2015) ("INCOMPAS Petition").

<sup>6</sup> See *News Corp. and DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control*, MB Docket No. 07-18, *Memorandum Opinion and Order*, 23 FCC Rcd. 3265, 3278 ¶ 25 (2008); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, Memorandum and Order*, 15 FCC Rcd. 9816, 9821 ¶ 10 (2000); see also *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order*, 12 FCC Rcd. 19985, 20035-36 ¶ 95 (1997).

<sup>7</sup> While the Commission has found that "advanced telecommunications capability" requires a broadband connection offering 25 Mbps/3 Mbps for consumers, nearly half of consumers (45%) only have access to one provider offering the baseline speed, while 17% of the population lacks access to any provider offering high-speed service. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 2015 Broadband Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, 30 FCC Rcd. 1375, 1421 ¶ 83, Chart 2 (2015).

<sup>8</sup> Almost two-thirds of customers in the New Charter footprint will not have access to at least one alternative high-speed (25 Mbps) broadband provider. See Application at 60 ("[M]ore than one in three households in the New Charter footprint already had access to at least one wireline alternative (in addition to the merging firms) offering download speeds of 25 Mbps or faster.").

Indeed, the Commission has gone well beyond merely identifying the problem of lagging broadband competition; it has made its reversal a top Commission priority. Further, it has engaged in a number of significant efforts to promote broadband deployment and remove barriers to broadband investment.

Relative to the Commission’s mandate to review the competitive effects of the merger on future broadband competition, as well as its efforts to promote broadband deployment and remove barriers to broadband infrastructure investment, Congress passed the Telecommunications Act of 1996 (“1996 Act”). The 1996 Act directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by . . . removing barriers to infrastructure investment . . . .”<sup>9</sup> If the Commission finds that deployment to all Americans is not happening in such a manner, Congress directed the Commission to “take immediate action to accelerate deployment of such capability . . . .”<sup>10</sup> Applicants do not provide a shred of evidence to rebut INCOMPAS’s argument that the merger would create a new, significant barrier to the promotion of broadband competition and investment in broadband infrastructure.<sup>11</sup>

Instead, after INCOMPAS highlighted Applicants’ failure to analyze the effect of the proposed merger on future broadband competition, Charter suddenly found new public interest

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<sup>9</sup> See 47 U.S.C. § 1302(a) (directing the Commission to “encourage the deployment . . . of advanced telecommunications capability to all Americans”); *id.* § 1302(b) (directing the Commission to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonably and timely fashion”).

<sup>10</sup> *Id.* § 1302(b).

<sup>11</sup> See INCOMPAS Petition at 5-13.

benefits not identified in its original Application.<sup>12</sup> Specifically, Charter engaged in a regulatory mid-course correction in its Opposition, disclosing what likely has been an important motivation for the proposed transaction: price discounts from programmers resulting from the merger.<sup>13</sup> Recognizing that such a self-interested motive does not justify Commission approval of the transaction, Charter introduced new evidence in its Opposition through an expert declaration that claims that such price discounts not only will benefit New Charter, but will be accompanied by a {{BEGIN HCI       END HCI}} pass-through rate that will generate {{BEGIN HCI       END HCI}} of savings per month per subscriber on legacy Charter systems.<sup>14</sup>

Charter's presentation of a new public interest benefit deserves careful scrutiny. To that end, INCOMPAS has retained its own expert economists to, among other things, review Charter's evidence and undertake the analysis that the Applicants' economists have not.<sup>15</sup> But assuming for the time-being that the assertion is true, it is not appropriate to apply such a public

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<sup>12</sup> Applicants' search for new benefits of the transaction are understandable, given that few if any of the benefits they put forward in the Application are concrete or transaction-specific. *See* DISH Network Corp., Petition to Deny, MB Docket No. 15-149, at 34-42 (Oct. 13, 2015) ("In short, Charter's exposition on the 'benefits' that are supposed to inure to the public is badly deficient.").

<sup>13</sup> Opposition at 25 ("The Transaction will enable New Charter to produce benefits directly related to its increased scale. Charter estimates that this scale will generate cost savings of approximately \$800 million annually—approximately {{BEGIN HCI       END HCI}}").

<sup>14</sup> Opposition at 26 (citing Declaration of Dr. Michael L. Katz, Sarin Chair Professor of Economics at the Berkeley Haas School of Business and Senior Consultant at Compass Lexecon, ¶¶ 65-67 (Nov. 2, 2015) ("Katz Decl.") (Attached as Exhibit B to Opposition)).

<sup>15</sup> INCOMPAS intends to submit that analysis in this docket once completed.



interest benefit to answer for the negative impact that the proposed merger would have on future broadband competition.<sup>16</sup>

Moreover, the claimed public interest benefit of programming cost savings is specious because Charter's economist identifies the mechanism that could result in identical—or even greater—cost savings without the need to merge with Time Warner Cable. In his declaration, Charter's economist suggests that participation in a video programming purchasing cooperative could achieve similar programming cost savings. In fact, he discloses that Charter attempted to participate in a cooperative purchasing group six years earlier.<sup>17</sup> Commission precedent requires an exploration of Charter's economist's suggestion that a video programming purchasing cooperative could achieve similar public interest benefits.<sup>18</sup>

Applicants' interconnection policy also falls short. While the Opposition includes a number of welcome "clarifications," there remain several shortcomings that should be addressed. Specifically, the policy continues to allow Applicants to significantly limit the ability of backbone providers to grow their capacity and to give Applicants the untethered ability to impose substantial infrastructure deployment costs on transit providers. Further, the short period for which Charter has agreed to abide by the agreement is insufficient to ensure the kind of robust protection necessary to avoid significant consumer harm.

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<sup>16</sup> *Application of Echostar Comm'cns Corp., General Motors Corp., and Hughes Elecs. Corp. (Transferors) and Echostar Comm'cns Corp. (Transferee), Hearing Designation Order*, 17 FCC Rcd. 20559, 20630 ¶ 189 (2002) ("*Echostar/DIRECTV HDO*").

<sup>17</sup> Katz Decl. ¶ 39.

<sup>18</sup> *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, Staff Analysis and Findings*, 26 FCC Rcd. 16189, 16247 ¶ 124 (Nov. 29, 2011) ("*AT&T/T-Mobile Analysis*"). See Katz Decl. ¶¶ 37-39 (stating that programming purchasing cooperatives "may achieve cost savings").

**II. THE MERGER WOULD CREATE A SIGNIFICANT, NEW BARRIER TO BROADBAND COMPETITION AND INFRASTRUCTURE INVESTMENT**

**A. Applicants Now Acknowledge that the Combined Firm Would Obtain Lower Prices from Video Programmers Due to Increased Scale but Claim that Such Savings Would Benefit Consumers**

The Opposition represents a mid-course correction from the Application by now acknowledging that the combined firm would enjoy price discounts from video programmers but that such pricing power ultimately would benefit consumers. In its Application, Charter claims substantial cost savings “in a number of areas.”<sup>19</sup> But with regard to programming, Charter demurs: “the Transaction is unlikely to materially enhance New Charter’s bargaining power in negotiations for video programming as compared to Time Warner Cable” because “programmers have significant bargaining power.”<sup>20</sup> Indeed, Charter’s economist devotes only three sentences to this topic.<sup>21</sup>

In its Opposition, however, Charter submits a new economic report, which spends 44 pages presenting allegedly empirical evidence on how the combined firm’s reduced video programming costs would benefit consumers. Charter’s economist estimates that New Charter would enjoy some {{BEGIN HCI    END HCI}} per subscriber savings compared to Charter’s legacy fees.<sup>22</sup> He calculates that New Charter’s cost savings would grow by some {{BEGIN

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<sup>19</sup> Application at 31.

<sup>20</sup> *Id.* at 57.

<sup>21</sup> Statement of Dr. Fiona Scott Morton, Public Interest Statement Concerning the Merger of Charter, Bright House, and Time Warner Cable, MB Docket No. 15-149, ¶ 23 (June 24, 2015) (“I also understand that TWC has lower programming costs than Charter. Because programming costs are typically paid on a per-subscriber basis, if New Charter can lower its programming costs for current Charter subscribers by purchasing all of its programming under TWC’s terms, it will reduce New Charter’s marginal cost per video subscriber. Part of that reduction in cost would likely be passed through to subscribers in the form of lower prices.”).

<sup>22</sup> Katz Decl. ¶ 22.

HCI      END HCI}} percent per year.<sup>23</sup> In a July 10, 2015 ex parte, Charter submitted that the cost savings just from using TWC’s programming contracts would save it {{BEGIN HCI  
END HCI}} annually within three years.<sup>24</sup>

Despite this new emphasis on programming-price leverage, Charter’s economist almost surely underestimates the extent of market power that the combined firm would enjoy over video programmers. While he assumes Charter will benefit from the discounted prices TWC enjoys, he fails to analyze the extent to which the combined firm would be able to extract discounts greater than TWC alone could extract, despite providing a graph suggesting that it would.<sup>25</sup> By analyzing only his admittedly “conservative”<sup>26</sup> calculations, he also underrepresents the merger-specific harm that this transaction would have on future broadband competition in the TWC footprint.

Instead, Charter’s economist calculates (insufficiently) the potential pass-through of those cost savings to consumers, tellingly without any commitment from Charter that it would pass through such savings to consumers or reliable evidence that it has passed on previous cost savings.<sup>27</sup> It is not surprising that the Opposition makes this case, because the Application notably lacks tangible merger-specific public interest benefits. While the question of whether New Charter’s cost savings would in fact be passed through to customers deserves Commission scrutiny, such a benefit—if it were tangible—does not and cannot serve to address the primary

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<sup>23</sup> *Id.* ¶ 25.

<sup>24</sup> See Letter from John L. Flynn, Counsel for Charter, to Marlene H. Dortch, FCC, MB Docket No. 15-149, at 2 (July 10, 2015).

<sup>25</sup> Katz Decl. ¶ 17, Figure 1.

<sup>26</sup> *Id.* ¶ 30.

<sup>27</sup> See *id.* ¶¶ 40-55.

public interest harm identified by INCOMPAS in its Petition to Deny: the negative effect the merger would have on future broadband competition in the combined entity's footprint.

**B. Applicants Fail to Analyze the Effect the Merger Would Have on Future Broadband Competition**

Despite emphasizing the importance of broadband in its Application, Charter leaves unanswered the key question is this proceeding: whether the proposed merger would have a negative effect on future broadband competition. It would. The merger not only would eliminate the potential for TWC and Charter to build into each other's neighboring footprints, it would materially increase the difficulty for future market entry by broadband competitors.

As INCOMPAS demonstrated in its Petition to Deny, this transaction would exacerbate the cost disadvantages that potential broadband entrants would face relative to New Charter, creating a significant, new barrier to broadband development and infrastructure investment in New Charter's footprint.<sup>28</sup>

In addition, Charter does not acknowledge in its pleadings how a potential broadband competitor would create an alternative and superior marketplace incentive in improving consumers' broadband services, despite internal documents from TWC that {{BEGIN HCI

END HCI}}.<sup>29</sup> In fact, Charter's internal documents note that Charter intends to {{BEGIN HCI

END HCI}}.<sup>30</sup>

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<sup>28</sup> INCOMPAS Petition at 5-13.

<sup>29</sup> {{BEGIN HCI END HCI}}.

<sup>30</sup> {{BEGIN HCI END HCI}}.

**C. Harm to Future Broadband Competition Cannot Be Offset by Lower Prices Resulting from Video Programming Price Savings**

Applicants attempt to divert attention from the harm to future broadband competition by claiming consumer benefits from lower video programming prices.

The transaction's negative effects in the market for potential broadband competition, however, cannot be offset by alleged pro-competitive benefits in the market for MVPD services. Indeed, the Supreme Court in *United States v. Philadelphia National Bank* found that harm to commercial banking competition in Philadelphia caused by the merger of two Philadelphia banks could not be offset by their increased ability to compete with large out-of-state banks in a different market, namely the market for very large loans. The Court said: "If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could . . . embark on a series of mergers that would make it, in the end, as large as the industry leader."<sup>31</sup> Applicants cannot rob Peter (future broadband competition) to pay Paul (MVPD customers). In fact it is worse. Applicants ask the Commission to allow it to rob Peter (future broadband competition) in exchange for an economist's theory that Paul (MVPD customers) likely will be paid in the future.

Even the claimed public interest benefit from programming cost savings warrants rejection. Charter has identified a non-merger mechanism that could result in identical—or even greater—cost savings. Even if Charter's cost savings from the merger were passed through to consumers pursuant to its economist's calculations, the Commission should reject such public

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<sup>31</sup> *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963) (rejecting the argument that a merger of Philadelphia banks would enable it to compete with large out-of-state banks for very large loans); *see also RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979) (providing that anticompetitive effects of merger are not offset by the increased ability to compete in another market).

interest benefit if those savings “can be achieved through means less harmful to competition than the proposed merger . . . .”<sup>32</sup>

In this case, Charter’s economist raises the concept of a video programming purchasing cooperative as a potential mechanism for Charter to achieve programming cost savings similar to those created by the merger. In fact, he discloses that Charter attempted to create such a cooperative purchasing group six years earlier. The Commission should fully explore this mechanism as an alternative, non-merger means of achieving video programming purchasing efficiencies. Such a purchasing cooperative could mitigate the harm to future broadband competition by allowing potential broadband entrants to join and narrow the programming cost disparity between Applicants and smaller, competitive broadband service providers.

Charter’s economist, Dr. Katz, explains in his declaration that “buying cooperatives [can] achieve cost savings when buyers are seeking similar products under similar terms.”<sup>33</sup> That proposal is incredibly significant here, because it would preserve competition among the entities involved—both for broadband and video services. After all, the parties may be negotiating jointly with regard to the cost of programming, but they would still could compete against each other in the service they provide to consumers.

Once raised, Dr. Katz quickly and inadequately dismisses the idea of a coop. First, he claims that coops are not workable here, because “MVPDs such as Charter and TWC negotiate complex distribution rights, license content for different programming lineups, and have

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<sup>32</sup> *EchoStar/DIRECTV HDO*, 17 FCC Rcd. at 20630 ¶ 189; *see also* DOJ and FTC, Horizontal Merger Guidelines § 10 n.13 (Aug. 2010) (stating that “the agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing”).

<sup>33</sup> Katz Decl. ¶ 37.

different licensing priorities.”<sup>34</sup> That claim is difficult to square with his explanation later in his declaration for why Most Favored Nation (“MFN”) clauses are so valuable. There, Dr. Katz explains that MFNs are valuable because MVPDs negotiate over the same programming. He notes that “a significant component of programming value is common to all MVPDs,” and that MFNs are critical to ensuring that MVPDs receive “market” rate and rights over the long term.<sup>35</sup>

Second, Dr. Katz claims that coops are simply unworkable, given that Charter “found it very difficult to reach an agreement” with the members of the National Cable Television Cooperative (“NCTC”) when it considered joining that cooperative in 2009.<sup>36</sup> He provides no analysis but instead devotes only a few paragraphs based on an interview he conducted with a Charter employee to support his claim.

The Commission should not accept at face value Dr. Katz’s assertions regarding the impracticality of a video purchasing cooperative. Purchasing cooperatives are common across industries and in fields no less complex than the video industry.<sup>37</sup> Against such widespread acceptance of the value and effectiveness of purchasing cooperatives, Dr. Katz’s anecdotal evidence about the unworkability of a cooperative in this instance is insufficient. Moreover, his claim seems inconsistent with TWC’s cooperative purchasing agreement with Bright House,

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* ¶ 112.

<sup>36</sup> *Id.* ¶ 39.

<sup>37</sup> See DOJ and FTC, Statements of Antitrust Enforcement Policy in Health Care, Statement 7 (1996), [http://www.justice.gov/atr/statements-antitrust-enforcement-policy-health-care#CONTNUM\\_53](http://www.justice.gov/atr/statements-antitrust-enforcement-policy-health-care#CONTNUM_53).

which has allowed the significantly smaller Bright House to enjoy the same rights and access to programming as TWC for many years.<sup>38</sup>

Further, if a video programming purchasing cooperative included smaller bundled services providers, the cooperative would promote additional broadband infrastructure investment in the Charter and TWC footprints by equalizing the video programming purchasing costs, which currently serve as the primary hurdle to building new broadband networks.<sup>39</sup>

**D. Public Interest Benefits from Broadband Competition Would Dwarf Charter’s Assertion of Consumer Benefits from Video Programming Price Savings**

The Commission has long employed “a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.”<sup>40</sup> That balance does not favor Applicants. Even assuming a consumer benefit would result from video programming price savings as a result of the merger, such benefit would be dwarfed by benefits created by broadband competition that could occur but for the effects of the merger on such potential competition. Applicants have yet to calculate the cost of the broadband competition

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<sup>38</sup> Dr. Katz apparently recognizes this incongruity, yet includes only a footnote to say briefly that such an arrangement only works for TWC and Bright House because of the “close coordination” that the two companies undertake. But Dr. Katz provides no tangible evidence to support his claim that such close coordination is necessary to achieve success through a coop.

<sup>39</sup> INCOMPAS Petition at 8-13.

<sup>40</sup> *Applications of Comcast Corp., General Elec. Co. and NBCUniversal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4247 ¶ 22 (2011) (“Comcast/NBCU Order”); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd 12348, 12363 ¶ 30 (2008); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control, Memorandum Opinion and Order*, 23 FCC Rcd 3265, 3276 ¶ 22 (2008); *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.



delayed or diverted as a result of New Charter’s increased delta between its video-related costs and potential rivals’ costs. That calculation is unlikely to be kind.<sup>41</sup>

After all, one might think about the potential consumer harm by looking at the potential benefits to consumers of broadband competition that could be foregone. For example, in April 2013, Google Fiber announced that it intended to deploy service in Austin, Texas.<sup>42</sup> As a result of that announcement only, TWC increased its broadband speeds by between 50% and 667% without any additional charge to consumers, leading to significant decreases in the cost to consumers for each Mbps as a result of the mere prospect of new competition.<sup>43</sup>

**Table 1: TWC Speed Upgrades and Per Mbps Decrease<sup>44</sup>**

<b>Initial Speed Tier</b>	<b>Speed Tier Post Google Fiber</b>	<b>Price</b>	<b>Price Per Mbps Decrease</b>	<b>Percentage Decrease in Price Per Mbps</b>
2/1 Mbps	3/1 Mbps	\$14.99	\$2.50	33.33%
3/1 Mbps	10/1 Mbps	\$29.99	\$7.00	70.00%
15/1 Mbps	50/5 Mbps	\$34.99	\$1.63	70.00%
20/2 Mbps	100/10 Mbps	\$44.99	\$1.80	80.00%
30/5 Mbps	200/20 Mbps	\$54.99	\$1.56	85.00%
50/5 Mbps	300/20 Mbps	\$64.99	\$1.08	83.33%

<sup>41</sup> INCOMPAS has engaged economists to perform this analysis and intends to submit the results in the docket.

<sup>42</sup> See *Google Fiber’s Next Stop: Austin, Texas*, GOOGLE FIBER BLOG (Apr. 9, 2013), [http://googlefiberblog.blogspot.com/2013/04/google-fibers-next-stop-austin-texas\\_9.html](http://googlefiberblog.blogspot.com/2013/04/google-fibers-next-stop-austin-texas_9.html).

<sup>43</sup> Press Release, Time Warner Cable Bringing Incredibly Fast Internet Plans Across Its Entire Austin Service Area, TIME WARNER CABLE (Feb. 20, 2014), <https://www.timewarnercable.com/content/twc/en/about-us/press/twc-bringing-incredibly-fast-internet-to-austin.html>.

<sup>44</sup> The value was derived by multiplying the price per Mbps for each speed tier by the increase in download speed provided post-Google Fiber deployment. See *High-Speed Internet Plans and Packages*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/planspackages/internet/internet-service-plans.html> (last visited Nov. 12, 2015).

Applicants must demonstrate that there are public interest benefits that outweigh the harms caused by the proposed transaction. Applicants have not met that burden. Indeed, their Opposition raises more questions than answers. It is imperative that the Commission fully investigate the impact the proposed transaction will have on broadband competition. Moreover, as discussed immediately below, significant issues remain with Charter’s interconnection policy that cannot be ignored.

### **III. APPLICANTS STILL DO NOT GO FAR ENOUGH ON INTERCONNECTION**

Several parties raised concerns about various aspects of Charter’s interconnection policy. In response, Charter offered several concessions and clarifications, including clarifying that the policy (1) extends to all Internet traffic, including from Content Delivery Networks (“CDNs”), (2) does not require a trial period for current interconnection partners, and (3) does not discriminate against any type or source of traffic.<sup>45</sup>

Those clarifications are welcome, but insufficient. Charter’s interconnection policy continues to be of concern in three areas:

- Demand that Charter can suspend interconnection for traffic growth;
- Demand that Charter can unilaterally force peering partners to meet in new locations of Charter’s choosing, and;
- Unreasonably short commitment to the interconnection policy.

#### **A. Demand that Charter Can Suspend Interconnection for Traffic Growth**

Charter continues to assert the right to suspend its interconnection policy when an interconnecting entity’s traffic grows a mere 5.9% over a rolling six-month period or a 10% higher peak compared to the prior peak. Charter points out that a 5.9% monthly compounded

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<sup>45</sup> Opposition at 12-15.

growth is approximately equivalent to a doubling of traffic in a 12-month period. And it argues that a 10% higher peak would be equivalent to a rate of increase that would be doubling of traffic in about seven months.<sup>46</sup>

But by capping an entity's individual growth rate on a month-by-month basis, Charter can stop in its track meaningful competition among transit providers. For example, if Transit Company A convinces a large client to switch traffic delivery from Transit Company B, Transit Company A's traffic might grow by 100%, triggering Charter's suspension policy. The policy fails to account for the fact, however, that Transit Company B's traffic will wane proportionately. And, the traffic gained by Transit Company A and lost by Transit Company B will be exchanged at exactly the same points as before the switch. In other words, overall Internet traffic into Charter's network has not changed, and Charter would not incur new costs to accommodate the switch.

**B. Demand that Charter Can Unilaterally Force Peering Partners to Meet in New Locations of Charter's Choosing**

Charter demands the right to force peering partners to meet Charter in new locations of Charter's choosing to gain sole discretion over the placement of new interconnection locations.<sup>47</sup> Interconnection locations should be mutually agreed upon by peering parties and consent should not be unreasonably withheld. Otherwise, New Charter would be able to impose significant infrastructure costs in the form of infrastructure expenditures from transit and CDN providers as a condition of interconnection. The result would be providing Charter with the unilateral right to

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<sup>46</sup> *Id.* at 14.

<sup>47</sup> *Id.* at 13.

end the peering arrangement simply by making unreasonable demands about the locations at which peering must take place.

**C. Unreasonably Short Commitment to the Interconnection Policy**

Charter continues to resist extending its interconnection agreement beyond three years.<sup>48</sup>

A reasonable agreement would need to last for a longer period to ensure stability, performance, and scalability for the Internet ecosystem. A seven-year commitment would be more reasonable, given the significant and long-term impact of the proposed transaction.<sup>49</sup>

In fact, it is odd that the Applicants are not more willing to modify Charter's interconnection policy given their claims that "the transaction will better enable new Charter to support OVD entry and innovation."<sup>50</sup> The Commission should require them to resubmit the policy with the changes they have committed to, as well as require them to address the remaining issues on the record, and require that Applicants commit to this interconnection policy throughout the New Charter's territory for seven years as a condition to merge.

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<sup>48</sup> *Id.* at 12-13.

<sup>49</sup> *See Comcast/NBCU Order*, 26 FCC Rcd. at 4381, Section XX. Term (imposing conditions that "shall remain in effect for seven years following the date of this Order"). In addition to the conditions imposed, Comcast made seven-year commitments.

<sup>50</sup> *See* Opposition Section I.B.

**IV. CONCLUSION**

For the foregoing reasons, the Commission should deny the Application or designate it for a hearing.

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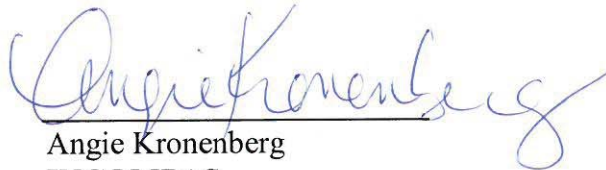
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November 12, 2015

**DECLARATION**

I declare under penalty of perjury that the facts contained within the foregoing Reply, except for those facts for which official notice may be taken, are true and correct to the best of my information, knowledge and belief.

Executed on November 12, 2015.

A handwritten signature in blue ink, appearing to read "Angie Kronenberg", is written over a horizontal line.

Angie Kronenberg  
**INCOMPAS**

**CERTIFICATE OF SERVICE**

I, Markham C. Erickson, hereby certify that on November 12, 2015, I caused true and correct copies of the foregoing to be served by electronic mail upon the following counsel:

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Sincerely,

A handwritten signature in black ink, appearing to read 'M.C. Erickson', with a horizontal line underneath.

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